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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940.

No. 167

A. H. THORNBURGH, ADMINISTRATOR OF THE ESTATE OF WINSTON ARTHUR CAMERON, DECEASED, PETITIONER,

VS.

UNITED STATES OF AMERICA, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

LAWRENCE E. GOLDMAN,
FRANK R. DALEY,
Kansas City, Missouri,
Attorneys and Counselors for Petitioner.

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SUPREME COURT OF THE UNITED STATES

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A. H. THORNBURGH, ADMINISTRATOR OF THE ESTATE OF WINSTON ARTHUR CAMERON, DECEASED, PETITIONER.

VS.

UNITED STATES OF AMERICA, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Statement of Matter Involved.

Your petitioner, A. H. Thornburgh, administrator of the estate of Winston Arthur Cameron, deceased, respectfully represents that the Circuit Court of Appeals for the Eighth Circuit has reversed a judgment entered by the District Court of the United States for the Western District of Missouri, Southern Division, in favor of the petitioner in an action to recover disability benefits under a contract of war risk insurance issued to the deceased while he was in the naval service of the United States. (The opinion is reported in 111 F. (2) 278.)

Confident that he can demonstrate to this Honorable Court that the record plainly and unequivocally discloses a denial of his constitutional rights to a trial by jury, a unique and unusual procedure (unwarranted by law) in the review of the trial court proceedings and that the Circuit Court of Appeals exceeded its jurisdiction and authority in reversing the judgment of the District Court, the petitioner submits that a writ of certiorari should be granted in this cause for these and for the reasons hereinafter specified.

Statement of the Case.

Winston Arthur Cameron originally brought this suit in November, 1930, against the United States of America to establish its liability under a contract of war risk insurance and to enforce the payment of certain disability benefits provided therein. Mr. Cameron died on January 21, 1939, and the action was then continued and prosecuted in the name of the petitioner, as administrator of the veteran's estate.

The petition in this cause, as amended, alleged that while Cameron was in the naval service of the United States, he was granted an insurance contract which provided for its maturity in the event of death or permanent and total disability, in the amount of $10,000; that the insurance continued in force until June 24, 1920; that on May 11, 1920, or at a date prior to June 24, 1920, Cameron did become permanently and totally disabled by reason of pulmonary tuberculosis, heart trouble and asthma. The respondent denied liability.

On November 20, 1935, a general verdict was found in Cameron's favor and a judgment was accordingly

entered for him. The respondent then appealed to the Eighth Circuit Court of Appeals, which reversed and remanded the cause upon the ground that the plaintiff had not established that his total disability prior to June 24, 1920, was reasonably certain to continue throughout his life.

Thereafter, the cause was again tried in the District Court and a general verdict was found for the petitioner on April 8, 1939. The defendant appealed from this judgment to the Circuit Court of Appeals for the Eighth Circuit, complaining:

> (1) That the trial court erred in denying respondent's motion for a directed verdict in its favor at the close of all the evidence;
>
> (2) That the trial court erred in refusing to further instruct the jury on the duty of the veteran to take treatment and medical advice and if the jury was unable "to determine from the evidence whether or not the veteran would have recovered had he taken the advice and treatment, then their verdict should be for the defendant."

At the hearing before the Circuit Court of Appeals the second ground was not urged in view of the trial court's direction in its charge to the jury practically covering this request.

On May 2, 1940, the Eighth Circuit Court of Appeals reversed the judgment of the lower court on the ground that the medical evidence as to the permanency of the veteran's disability was not credible and that it was therefore speculative and conjectural, although it admitted that the evidence established (as the defendant conceded) that Cameron suffered from active pulmonary tuberculosis from 1919 to the date of his death.

There is no support in the record for the Circuit Court's conclusion that the petitioner's evidence did not establish by substantial evidence that Cameron was both permanently and totally disabled before June 24, 1920. In arriving at its decision, the court clearly invaded the province of the jury and usurped its exclusive functions. It ignored the important and substantial evidence of several of the doctors, refused to accept the competent and substantial testimony of Dr. Thornburgh and Dr. Camp (on the ground that the court did not credit their evidence, although they were corroborated in many respects by the defendant's medical expert and certain Government medical reports), denied to the petitioner the proper application of the rules of review as declared by this Honorable Court and by other Circuit Courts of Appeal, applying unusual and unwarranted tests in determining the sufficiency of the evidence, and as will hereafter appear, violated the petitioner's constitutional rights in other respects.

Summary of the Evidence.

The parties stipulated to the following facts:

That insured entered the United States Navy on October 6, 1917, and was discharged on April 9, 1918; that on December 8, 1917, he applied for and was granted $10,000 war risk insurance, which remained in full force and effect until June 24, 1920; that this insurance was payable in the event of death or permanent and total disability; that there existed proper disagreement between the parties so as to authorize the jurisdiction of the court.

Cameron entered the navy at the age of sixteen and while in service was hospitalized for pneumonia, pleurisy

and other ailments. (R. 26, 263.) At the time of his return home from the service he was in a very weakened physical condition, had a persistent cough, coughed up blood, had night sweats, shortness of breath, swelling of the feet and a severe bilateral ear disease. These symptoms persisted until his death. (R. 50, 52, 54, 109.)

It was undisputed that Cameron suffered from active tuberculosis from 1919 to the time of his death. The Circuit Court observed in its opinion that the Government's testimony tended to show that Cameron suffered from pulmonary tuberculosis, which remained active and progressive from 1919 until his death.

Following his return from service Cameron first received medical treatment from Dr. Henry and Dr. Fleming, and then in the spring of 1919 entered the care of Dr. A. H. Thornburgh and Dr. R. A. Sparks. (R. 29, 30, 31.)

On May 11, 1920, while the insurance was still in effect, Cameron was examined by Dr. D. C. Kalloch, a Government physician, who made a diagnosis of active pulmonary tuberculosis and chronic otitis media. (R. 109, pl. ex. 6.) His findings demonstrated that several lobes of the veteran's lungs were diseased.

In June, 1920, the veteran entered the Missouri State Sanitarium of Mt. Vernon, Missouri, where (as the appellate court stated) he did not receive proper treatment and suffered a severe hemorrhage. (R. 30, 32, 71.) He then returned home to the care of Dr. Sparks and Dr. Thornburgh. Several months later, upon their advice, he went to California where he remained for six years.

On April 16, 1925, the Veterans Bureau declared Cameron to be totally and permanently disabled. He was so rated until his death.

DR. R. A. SPARKS testified that Cameron consulted him in 1919 about his condition and a number of times thereafter until the fall of 1920. When he examined Cameron in 1919 he found him to be suffering from active pulmonary tuberculosis, complicated with an asthmatic condition and that his prognosis was unfavorable. (R. 148, 149, 150, 152, 153.)

DR. THORNBURGH, a prominent physician with an extensive experience in the treatment of chest conditions, first examined Cameron in June, 1919, and had him under his care until he went to California in 1920, and at various times thereafter. He testified that in 1919 he found Cameron to be suffering from chronic, active, moderately advanced pulmonary tuberculosis complicated with myocarditis (heart disease) and asthma, and that he also had chronic inflammation of both middle ears. He testified that he found several small cavities in the apices of the lungs; that the disease had spread over three lobes of the lungs and also involved the bronchial tubes (R. 157, 158, 159, 160, 161, 162); that Cameron had the severe type of lesion. (R. 164, 165.)

The doctor further testified that it was his opinion in 1919 that because of Cameron's age and the condition that he found him in, the patient would not recover; that he never held out any reasonable hope for recovery at any time (R. 168, 169); that it was his belief then and thereafter that the condition that Cameron was in would continue as long as he lived and that it would be dangerous for him to attempt any kind of work. (R. 171, 187.)

> "It was my judgment that he would not recover to the extent of being able to carry on any gainful occupation without danger to himself and to his life." (R. 187.)

The doctor's evidence was uncontroverted and his findings and opinion were supported, not only by plaintiff's other medical experts, but also by the Government's examination of May 11, 1920, to which reference will later be made, and Dr. Snider, the defense expert.

DR. FRANCIS CAMP, a specialist in internal medicine, testifying as an expert, basing his opinion upon Dr. Thornburgh's physical findings in 1919 and Cameron's constitutional symptoms then present, testified that in his opinion Cameron was in 1919 suffering from active advanced tuberculosis and that in his opinion the patient's condition was permanent. (R. 190, 192.)

A large number of Veterans Bureau medical examination reports were introduced by the plaintiff covering the period between 1920 and 1937. All of these substantiated the petitioner's contention that Cameron was suffering from chronic, progressive advanced pulmonary tuberculosis, which affected all lobes of the veteran's lungs. (R. 109, 144.)

Here we call attention to the testimony of the defendant's medical expert, Dr. Snider, who testified that where more than two lobes are involved, or where there are multiple cavities in the lungs, then the case is to be classified as "far advanced" (R. 245); that the myocarditis, which was present in 1919, was due to the poisoning of the heart by the tuberculosis and the damage to that organ was permanent. A hypothetical question upon the case was propounded to Dr. Snider and it was his opinion that the patient presented an advanced case of tuberculosis in 1919 and that the outlook for recovery was "pretty bad." (R. 254.)

Dr. Snider was asked the meaning and significance of the findings contained in the Government examination report of May 11, 1920. (R. 109.) In the light of his explanation of the terms and findings, that report discloses that more than two lobes, and at least three lobes, of Cameron's lungs were then involved. This is significant in that Dr. Thornburgh's testimony as to his findings were corroborated by the findings of that Government examiner.

In 1921 Cameron applied for vocational training, but was rejected because of his physical condition. (R. 47, 48, 113.) Thereafter, he made several intermittent and unsuccessful attempts to engage in employment but these efforts were defeated by his physical condition. He continued under medical supervision of the Veterans Bureau from May 11, 1920, to his death. He died at Whipple Barracks, Arizona, on January 21, 1939.

Reasons Relied Upon for Granting Writ of Certiorari.

It is respectfully submitted that a writ of certiorari be granted for the following reasons:

1. That the Circuit Court of Appeals exceeded its authority and jurisdiction by invading the province of the jury, in that it assumed to weigh the evidence, pass upon the credibility of the witnesses, reject competent, material and relevant evidence, drew unwarranted inferences without factual basis and re-examined into the facts tried by the jury in a manner contrary to the usual and lawful procedure, all in contravention of the petitioner's right to trial by jury, as guaranteed by the Seventh Amendment to the Federal Constitution;

2. That the Circuit Court of Appeals has decided an important question of general law in a way conflicting with the decisions of this Honorable Court and the Circuit Courts of Appeal by taking upon itself and assuming the functions of a jury, and further, by adopting an unusual and unwarranted method and procedure in considering whether there was substantial evidence to support the verdict, and further, in characterizing substantial, material and positive evidence as speculative and conjectural;

3. That the Circuit Court of Appeals so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this court's power of supervision, in that, contrary and in a way conflicting with the decisions of this Honorable Court and the Circuit Courts of Appeal, in determining whether there was substantial evidence to support the verdict, the Eighth Circuit Court of Appeals did not, and failed to, view the evidence in the light most favorable to the plaintiff, did not form such favorable inferences as may be reasonably drawn therefrom, did not assume as established all facts that the evidence supporting the plaintiff's claim reasonably tends to prove, and all facts deducible therefrom, nor presume that the facts warranted the verdict rendered by the jury, but instead, the Circuit Court of Appeals, as the record plainly discloses, reviewed the evidence in the most unfavorable light, rejected substantial, competent and material evidence, drew conclusions and inferences not warranted by the facts in evidence, interpreted evidence in an unwarranted and untenable light, characterized as speculation certain substantial, material and positive evidence, and reversed the judgment upon a hypothesis (as to the deceased's condition during the life of the policy) which has no basis whatever in the evidence of the case;

4. That the Circuit Court of Appeals by reversing the judgment, in the manner aforesaid, wrongfully deprived the petitioner of valuable rights and property without due process of law as guaranteed by the Fifth Amendment to the Constitution;

5. That the petitioner, plaintiff below, is entitled, under the law and the evidence, to recover and the Circuit Court of Appeals wrongfully reversed the judgment of the lower court.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Eighth Circuit, commanding that court to certify and to send to this court, for its review and determination, on a day certain to be therein named, the full and complete transcript of the record and all proceedings in this case, numbered 11589 —Civil, and entitled "United States of America, Appellant vs. A. H. Thornburgh, Administrator of the Estate of Winston Arthur Cameron, deceased, Appellee;" that said judgment of the Eighth Circuit Court of Appeals be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem just and proper; and your petitioner will ever pray.

A. H. THORNBURGH,
Administrator of the Estate of Winston Arthur Cameron, Deceased, Petitioner.

LAWRENCE E. GOLDMAN,
FRANK R. DALEY,
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